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In The

Supreme Court of the United States

October Term, 1942.

No. 282

GEORGE W. MASON and HAZEL B. MASON, his wife,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1- 8
Summary statement of matter involved	2- 5
Jurisdiction	6
Questions presented	6
Reasons relied on for the allowance of the writ	7
Prayer for writ	8
Brief in support of petition	9-20
Opinions of court and board below	9
Jurisdiction	10
Statement of the case	11
Specification of errors	11
Argument	12-20
Summary of Argument	12-20
Point A. The Circuit Court of Appeals, in determining that the stock so purchased constituted compensation for services, has rendered a decision directly in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *Omaha National Bank v. Commissioner (1935), 75 Fed. (2d) 434*	13-18

Point B. The Circuit Court of Appeals, in construing Taxpayer's contract to provide that the stock purchased thereunder constituted compensation for services, has so far departed from the accepted and usual course of judicial proceedings and so far sanctioned such a departure by the Board of Tax Appeals as to call for an exercise of this court's power of supervision..... 18-19

Point C. The Circuit Court of Appeals, in determining that the stock so purchased constituted compensation for services, has decided an important question of federal law has not been, but should be, settled by this court 19-20

Conclusion 20

Table of Cases Cited.

Forsyth v. Hammond (1896), 166 U. S. 506, 41 L. Ed. 1095 10

International Railway Company v. Davidson (1921), 257 U. S. 506, 66 L. Ed. 341 10

Omaha National Bank v. Commissioner (1935), 75 Fed. (2d) 434 .....7, 12, 13

Thomson Spot Welder Company v. Ford Motor Company (1923), 265 U. S. 445, 68 L. Ed. 1098 10

Statute Cited.

Judicial Code, Sec. 240 (a) as amended, being 28 U. S. C. A., Sec. 347 (a) 10

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TO THE HON. HARLAN FISKE STONE, CHIEF JUSTICE OF THE UNITED STATES, and the ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, GEORGE W. MASON and HAZEL B. MASON, his wife, respectfully show:

I.

SUMMARY STATEMENT OF MATTER INVOLVED.

This cause involves a claimed deficiency in petitioners' income tax in the amount of $10,827.57 for the calendar year 1935 (R. 16).

Petitioner, George W. Mason (hereinafter referred to as "Taxpayer"), on September 7, 1933, entered into a contract with Kelvinator Corporation whereby he agreed to be employed by the latter as its general manager for a term of four years from October 1, 1933, the contract prescribing a fixed "rate of compensation" and certain "further compensation" (R. 10, 11, 15).

The fixed "rate of compensation" was provided for in paragraph "First," subdivision (2) of the contract, which reads as follows:

> "The rate of compensation shall be:
> '(a) Fifty thousand dollars ($50,000) per annum payable in equal semi-monthly installments.
> '(b) One thousand two hundred and fifty (1,250) shares of full paid stock of the corporation to be delivered on January 1, 1934, and quarterly thereafter to and including October 1, 1937' " (R. 11).

The "further compensation" was prescribed in the first sentence of paragraph "First," subdivision (3) of the contract, in the following provision:

> "The corporation further agrees as further compensation to Mason to *pay* him on January 15, 1935,

> 1936, 1937 and 1938, a *sum* equal to ten per cent (10%) of the net earnings of the preceding fiscal year, determined as hereinafter set forth after deducting therefrom an amount equal to five per cent (5%) upon the capital and surplus of the corporation determined as hereinafter set forth" (R. 11). (Italics ours.)

The contract, however, was not solely an employment contract, but contained provisions whereby the Corporation agreed "to sell" and Taxpayer agreed "to purchase" at a fixed price of $10.00 per share on January 15th in the years 1935 to 1938, inclusive, such a number of shares of stock of Kelvinator Corporation as could be purchased with an amount of money equal to the sum payable to Taxpayer as a bonus. Taxpayer was not required, however, to use the money received as a bonus to pay the purchase price of the stock and was not required to take his bonus in the form of a credit on such purchase price (R. 11).

The provision establishing such sale reads in part as follows:

> "The corporation agrees to *sell* and Mason agrees to *purchase* at ten dollars ($10.00) per share on January 15th of each year as above set forth a number of shares of fully paid stock of the corporation equal to the sum, if any, payable to Mason on such date pursuant to the preceding section of this paragraph (3)" (R. 11). (Italics ours.)

Without attempting to argue the facts in the case but to set forth in substance the general nature of the contract, it will be noted that throughout the remainder of the entire contract the payment of the cash bonus and the sale and purchase of the stock are treated as separate

undertakings, the provisions relative to the cash bonus specifically referring to the payment of sums of money. The words "pay" and "payments" are used in Subdivision First (3) and (5) (a) in reference to the cash bonus, while on the other hand the provisions relative to the stock in question specifically refer to the "sale" and "purchase" of "shares of such stock" (R. 11-13). Nowhere in the contract is the stock in question designated as compensation for services although the 1250 shares of stock given quarterly as compensation and not involved in these proceedings are specifically designated in the contract as compensation (R. 10-15).

The amount determined to be payable to Taxpayer in cash on January 15, 1935, as a bonus under the bonus provision of the contract was $49,891.69, which amount he reported as income (R. 10, 20).

Pursuant to the sales agreement contained in the contract, Taxpayer purchased 4989 shares of Kelvinator Corporation stock for $49,890.00, the fixed contract price, which sum was slightly less than the cash bonus (R. 10, 11, 20).

The Commissioner contended that there was no agreement to purchase stock at a price of $10.00 per share, but an agreement to accept such stock in partial payment for services rendered, and that Petitioners' income was measured by the fair market value of the stock at the date it was received. On that basis, the Commissioner contended that Taxpayer erred in reporting as income the cash bonus for $49,891.69, but in lieu thereof should have reported the market value at the time of receipt of the 4989 shares of Kelvinator Corporation stock, which stock Taxpayer purchased under the purchase provision of

the contract at the agreed price of $10.00 per share (R. 20, 21).

Petitioners contend that they were correct in reporting the cash bonus received as income, and that the only income which will result from the acquisition of the 4989 shares of Kelvinator Corporation stock which Taxpayer purchased will arise at the time of the disposition of such stock by Taxpayer, at which time Taxpayer's cost price for the determination of taxable gain or loss will be $10.00 per share, the agreed contract price per share which he paid for it (R. 21).

On appeal to the Board of Tax Appeals, the action of the Commissioner in determining a deficiency of $10,827.57 in Petitioners' income tax for the calendar year 1935 was affirmed (R. 23). On a motion for rehearing, the Board refused to permit Petitioners to introduce evidence relating to the circumstances and conditions surrounding the parties at the time the contract was made, in order to explain the real intent of the parties, and evidence as to the manner in which Kelvinator Corporation treated the transactions on its books and records and in its income tax return (R. 30). Such evidence is contained in affidavits set forth on pages 31 to 45 of the Transcript of Record. The determination of the Board of Tax Appeals was affirmed by the Circuit Court of Appeals for the Sixth Circuit.

II.

JURISDICTION.

A statement disclosing the basis upon which this court has jurisdiction is contained in subdivision II of the supporting brief following this petition, which subdivision II is hereby adopted and made a part hereof.

III.

QUESTIONS PRESENTED.

The proceedings at bar involve no disputed questions of fact, the facts being stipulated. The questions presented are the following:

(1) Is the taxable income of the Taxpayer measured by the amount of bonus compensation that he contracted to receive and did receive under his contract or is it measured by the market value of the shares of stock which he purchased from the Corporation in accordance with his agreement to purchase the same?

(2) Should Taxpayer's agreement with Kelvinator Corporation be construed so as to disregard portions of such agreement and render portions thereof useless and inexplicable?

IV.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

Petitioners show the following reasons for the allowance of the Writ:

(1) The Circuit Court of Appeals, in determining that the market value of the stock so purchased at the time of receipt constituted compensation for services, has rendered a decision in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *Omaha National Bank v. Commissioner (1935), 75 Fed. (2d) 434.*

(2) The Circuit Court of Appeals in construing Taxpayer's contract to provide that the market value of the stock purchased thereunder, at the time of receipt, constituted compensation for services has so far departed from the accepted and usual course of judicial proceedings and so far sanctioned such a departure by the Board of Tax Appeals as to call for an exercise of this court's power of supervision.

(3) The Circuit Court of Appeals, in determining that the market value of the stock so purchased at the time of receipt constituted compensation for services, has decided an important question of Federal law, which has not been, but should be, settled by this court.

PRAYER.

WHEREFORE, your Petitioners pray that a Writ of Certiorari issue under the seal of this court, directed to the Circuit Court of Appeals for the Sixth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said court had in the case numbered and entitled on its docket, No. 8770, George W. Mason and Hazel B. Mason, his wife, Petitioners v. Commissioner of Internal Revenue, Respondent, to the end that this cause may be reviewed and determined by this court, as provided for by the statutes of the United States; and that the judgment herein of said court be reversed by the court, and for such further relief as to this court may seem proper.

Respectfully submitted,

COOK, SMITH, JACOBS and BEAKE,
VICTOR C. SWEARINGEN,
Counsel for Petitioners.

Dated July 31, 1942.